OP 10-0333

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

CHARLES LOKEY and VANESSA LOKEY,
Plaintiffs and Petitioners,

vs.

ANDREW J. BREUNER and A.M. WELLES, INC.,
Defendants and Respondents.

On Petition from the 18th Judicial District Court
Gallatin County
Hon. W. Nels Swandal

PETITION FOR SUPERVISORY CONTROL

Martin R. Studer
STUDER LAW OFFICES
638 Ferguson Ave., Suite 1
Bozeman, MT 59718
Ph: (406) 587-5022
Fax: (406) 587-5129
studer@bresnan.net

Attorney for Plaintiffs
and Petitioners

Guy W. Rogers
BROWN LAW FIRM, P.C.
P.O. Drawer 849
Billings, MT 59103-0849
Ph: (406) 248-2611
Fax: (406) 248-3128
grogers@brownfirm.com

Attorney for Defendant
and Respondent Breuner

Allan Baris
MOORE, O'CONNELL
& REFLING, P.C.
P.O. Box 1288
Bozeman, MT 59715
Ph: (406) 587-5511
Fax: (406) 587-9079
abaris@qwestoffice.net

Attorney for Defendant
and Respondent
A.M. Welles

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INTRODUCTION

This case is already up on appeal from an interlocutory order dismissing A.M. Welles, Inc., certified as final pursuant to Rule 54(b), M.R.Civ.P. *See Lokey v. Breuner,* No. 10-0101. The Lokeys have filed their opening brief, and Welles has requested an extension of time to file its answer brief.

The purpose of this petition is to draw attention to a second issue which will, regardless of the outcome of that appeal, prevent adjudication of the Lokeys' claims against Andrew Breuner on the merits – the District Court's gratuitous assertion that Charles Lokey violated § 61-8-324, MCA, which invades the province of the jury and is clearly erroneous.

Supervisory control is appropriate under Rule 14(3), M.R.App.P., and necessary to prevent the waste of judicial and private resources on a trial that will not resolve this case.

STATEMENT OF CASE

This is a personal injury action arising out of an accident that occurred when a truck driver hauling gravel for A.M. Welles, Inc., overtook and began to pass Charles Lokey, who was riding a bicycle on South 19th Avenue in Bozeman, and then stopped and gestured for an oncoming motorist, Andrew Breuner, who was waiting to make a left turn, to proceed, whereupon Breuner, relying on that gesture, turned in front of Lokey, who was unable to stop and suffered serious

injuries. *Amended Complaint* (Doc. 26),[1] at ¶¶ 2-7.

Lokey and his wife sued Breuner and Welles to recover compensation for his injuries and her loss of consortium, alleging:

> The Lokeys' injuries and damages were caused by defendants' negligence, including but not limited to . . . the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

Id., at ¶ 8.

The District Court dismissed Welles, stating:

> While it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road and had even passed him, Welles was no more responsible for Lokey than he was for any of the other hundreds of drivers on the road. All persons are required to use ordinary care to prevent others from being injured as a result of their conduct, but there is no statute or case law in Montana which requires more of Welles given the facts of this case. There simply is no authority for Lokey's proposition that a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there. . . .

Order Granting Motion to Dismiss (Doc. 40), copy attached as Appendix 1, at 4.

In addition, the District Court suggested that Lokey was negligent:

> . . . Lokey . . . never addressed the fact that he met none of the conditions under which he would be allowed to pass a vehicle on the right pursuant to § 61-8-324, M.C.A. . . .

Id., at 4-5.

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[1] The parenthetical refers to the District Court's docket number.

Encouraged by that gratuitous suggestion, Breuner filed a motion for summary judgment, arguing that Lokey was negligent as a matter of law because he violated § 61-8-324, MCA, which prohibits overtaking and passing on the right. *Defendant's Motion for Summary Judgment* (Doc. 43). Although the District Court found that there are genuine issues of material fact precluding summary judgment and denied that motion, it stated:

> It is true that Lokey violated § 61-8-324, M.C.A. and was cited for that violation. . . .

Order Denying Summary Judgment (Doc. 62), copy attached as Appendix 2, at 2.

Thus, while the District Court denied Breuner's motion for summary judgment, it entered a finding of fact and conclusion of law – now the law of the case – that invades the province of the jury, is clearly erroneous and will so adversely affect discovery, trial preparation, settlement negotiations and the trial itself that another appeal is inevitable.

The District Court certified Welles' dismissal as final for purposes of appeal, and the Lokeys appealed. They also appealed the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, but this Court declined to review that issue, necessitating this petition.

Rule 14(5)(a), M.R.App.P., states that a petition for supervisory control may be filed at any time. Although this Court previously declined to review the District Court's finding that Lokey violated § 61-8-324, MCA, that decision was

based on Rule 6(1)(3), M.R.App.P., and does not preclude supervisory control.

ISSUES PRESENTED

1. Whether the District Court's gratuitous assertion that Charles Lokey violated § 61-8-324, MCA, invades the province of the jury and is clearly erroneous.

2. Whether supervisory control is appropriate and necessary.

SUMMARY OF ARGUMENT

The District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, invades the province of the jury and is clearly erroneous. Having concluded that there are genuine issues of material fact precluding summary judgment, the District Court should have left that issue to the jury.

Supervisory control is appropriate under Rule 14(3), M.R.App.P., and necessary to prevent the waste of judicial and private resources on a trial that will not resolve this case.

ARGUMENT

1. The District Court's assertion that Lokey violated § 61-8-324, MCA, invades the province of the jury and is clearly erroneous.

Breuner filed a motion for summary judgment, arguing that Lokey violated § 61-8-324, MCA, which prohibits overtaking and passing on the right:

> **Overtaking vehicle on right.** (1) The operator of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

(a) when the vehicle overtaken is making or about to make a left turn; or

(b) upon a roadway with unobstructed pavement of sufficient width for two or more lanes of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.

(2) The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting safe movement. The movement may not be made by driving off the pavement or main-traveled portion of the roadway.

§ 61-8-324, MCA.

The District Court found that there are genuine issues of material fact precluding summary judgment, but asserted that Lokey violated § 61-8-324, MCA, and implied he was at fault:

> It is true that Lokey violated § 61-8-324, M.C.A. and was cited for that violation. "[A]s between two drivers – one who has been free from fault and violated no law, and one who has violated a law upon which the other depended – fault should, as a matter of public policy, be attributed to the person who violated the law. See *Craig v. Schell,* 1999 MT 40 ¶ 16, 293 Mont. 323, 975 P.2d 820.

Order Denying Summary Judgment (Appendix 2), at 2-3.

Although the District Court denied Breuner's motion for summary judgment, its gratuitous assertion that Lokey violated § 61-8-324, MCA, is now the law of the case. *State v. Carden*, 170 Mont. 437, 439-40, 555 P.2d 738, 739-40 (1976) ("when an issue is once judicially determined, that should be the end of the matter").

This Court should set aside the District Court's assertion that Lokey violated § 61-8-324, MCA, because the District Court misconstrued the law and that assertion invades the province of the jury and is clearly erroneous.

In construing a statute, the district courts are required to give meaning to each provision:

> **Role of the judge – preference to construction giving each provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

§ 1-2-101, MCA.

Section 61-8-324, MCA, does not prohibit passing on the right. It prohibits overtaking and passing on the right. However, the District Court overlooked or ignored that, stating:

> [Welles] argues that [a] bicyclist is held to the same rules of the road as the operator of a vehicle. . . . Those rules make it unlawful to pass a vehicle on the right side, unless the roadway in that direction is at least two lanes wide or the vehicle being passed is making a left turn. . . .

Order Granting Motion to Dismiss (Appendix 1), at 2 (citations omitted).

> . . . Lokey . . . never addressed the fact that he met none of the conditions under which he would be allowed to pass a vehicle on the right pursuant to § 61-8-324, M.C.A. . . .

Id., at 4-5.

There is no indication that the District Court even noticed the words "overtake," "overtaking" and "overtaken" in § 61-8-324, MCA, although they appear five times, and its construction of the statute, evident in its assertion that Lokey met none of the conditions under which he would be allowed to pass on the right, deprives "overtake" of any meaning or effect, in violation of § 1-2-101, MCA.

There is no evidence that Lokey overtook and passed Welles' truck. He was riding on the side of the road, near the fog line, allowing motorists to pass, when Welles' truck overtook and began to pass him. *Lokey Depo.*, copy attached to *Plaintiffs' Response to Welles' Motion to Dismiss* (Doc. 36) as Exhibit 2,[2] at 24:17 through 25:2 and 25:22 through 26:12. Then, while he was riding alongside the truck, the driver stopped and gestured for Breuner to turn. *Id.*, at 25:22 through 27:11, and 30:24 through 32:24; *Bohrman Depo.* (Doc. 37), at 10:16 through 11:6, 15:16 through 17:14, 18:17 through 19:2, and 19:7-14; and *Breuner Depo.* (Doc. 38), at 29:20 through 30:8.[3] Lokey continued forward and collided with Breuner, but since the truck never passed him, he did not overtake and pass the truck in violation of § 61-8-324, MCA.

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[2] Breuner has the original, but refused to file it, so the Lokeys have asked the District Court to order him to file it and supplement the record in *Lokey v. Breuner,* No. 10-0101.

[3] Welles' driver admitted in deposition that he forgot about Lokey. *Bohrman Depo.* (Doc. 37), at 20:2-10, and 22:11-16.

Although the District Court found that there are genuine issues of material fact precluding summary judgment, its conclusion that Lokey violated § 61-8-324, MCA, and was cited accordingly,[4] will prevent adjudication on the merits:

> . . . The defendant argues that because Lokey received a citation, paid the fine for his ticket and therefore admitted violation of the statute, there is no genuine issue of material fact regarding his negligence *per se* in this matter. Lokey counters that there are facts in dispute regarding the circumstances which resulted in the accident, and that he didn't fight the ticket does not mean he agreed with the officer's assessment of the situation. Additionally, Lokey argues that officer and expert testimony does not create irrefutable facts. The Court agrees. Although the Court will not allow Lokey to argue whether the citation was appropriate or accurate, it is up to the finder of fact to determine the sequence of events which lead to the issuance of the citation. . . .

Order Denying Summary Judgment (Appendix 2), at 2-3.

That paves the way for Breuner and Welles to offer Lokey's citation into evidence, and is clearly erroneous. Evidence of the issuance of a citation is highly prejudicial, and inadmissible. *Smith v. Rorvik*, 231 Mont. 85, 91, 751 P.2d 1053, 1056 (1988).

Having found that there are genuine issues of material fact precluding summary judgment, the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, and its evidentiary ruling, are not only erroneous, but invade the province of the jury. Since there are genuine issues of material fact precluding

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[4] Lokey was actually cited for violating § 61-8-602, MCA, which requires bicyclists to comply with § 61-8-324, MCA.

summary judgment, issues of negligence and causation must be left to the jury. *Payne v. Sorenson*, 183 Mont. 323, 327, 599 P.2d 362, 365 (1979).

The district courts should "exercise the greatest self-restraint in interfering with the constitutionally mandated processes of a jury decision." *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 13, 336 Mont. 105, 152 P.3d 727. Here, the District Court has not exercised that restraint. Its gratuitous assertion that Lokey violated § 61-8-324, MCA, invades the province of the jury, is clearly erroneous, and will prevent adjudication on the merits. It will have a significant impact on the course of discovery and trial, settlement will be rendered more difficult, the value of any verdict will be questionable, and an appeal is inevitable.

2. Supervisory control is appropriate under Rule 14(3), M.R.App.P., and necessary to prevent the waste of judicial and private resources on a trial that will not resolve this case.

Supervisory control is appropriate when the District Court is proceeding under a mistake of law, causing gross injustice, the petition raises a legal question, and urgency renders the normal appeal process inadequate. Rule 14(3), M.R.App.P. Urgency renders the normal appeal process inadequate when the District Court's mistake will adversely affect the course of discovery, trial preparation, settlement negotiations and the trial itself, the value of any verdict will be questionable, and an appeal is inevitable. *Plumb v. District Court*, 279 Mont. 363, 370, 927 P.2d 1011, 1015-16 (1996).

Here, it is beyond cavil that the District Court is proceeding under a mistake of law. Section 61-8-324, MCA, does not prohibit passing on the right. It prohibits overtaking and passing on the right. However, the District Court overlooked or ignored that, and its gratuitous assertion that Lokey violated § 61-8-324 because he met none of the conditions under which he would be allowed to pass on the right deprives "overtake" of any meaning or effect, in violation of § 1-2-101, MCA.

Section 61-8-324, MCA, is clear and unambiguous, and it is black-letter law, cited with approval in cases too numerous to mention, that the district courts must construe statutes in accordance with their plain language, neither omitting what is inserted nor inserting what is omitted. § 1-2-101, MCA. The District Court's construction of § 61-8-324, evident in its assertion that Lokey met none of the conditions under which he would be allowed to pass on the right, violates that rule, and is clearly erroneous.

The District Court's assertion that Lokey violated § 61-8-324, MCA, also invades the province of the jury. There is no evidence that Lokey overtook and passed Welles' truck, and a jury, properly instructed that § 61-8-324 only prohibits overtaking and passing on the right, could reasonably conclude that he did not violate the law. However, the District Court's assertion that he did, and was cited accordingly, prevents that, and is grossly unjust.

The District Court's evidentiary ruling, paving the way for Breuner and Welles to offer Lokey's citation into evidence and prohibiting him from challenging it, is also erroneous and unjust. Evidence of the issuance of a citation is highly prejudicial, and inadmissible. *Smith*, 231 Mont. at 91, 751 P.2d at 1056.

Since this case is already up on appeal from an interlocutory order, urgency renders the normal appeal process inadequate. Once this Court remands this case it will lose the opportunity to prevent the waste of judicial and private resources on litigation that cannot reasonably be expected to resolve anything. In the absence of supervisory control, the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, will adversely affect discovery, trial preparation, settlement negotiations and the trial itself, and an appeal is inevitable. Under these circumstances, the normal appeal process is clearly inadequate. *Plumb*, 279 Mont. at 370, 927 P.2d at 1015-16.

The District Court is proceeding under a mistake of law, causing gross injustice, this petition raises a legal question, and urgency renders the normal appeal process inadequate. Supervisory control is appropriate under Rule 14(3), M.R.App.P., and necessary to prevent the waste of judicial and private resources on a trial that will not resolve this case.

CONCLUSION

For all of the reasons set forth above, this Court should exercise supervisory

control, set aside the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, and remand this case for further proceedings consistent with that ruling and its decision in *Lokey v. Breuner*, No. 10-0101.

DATED this 7 day of July, 2010.

Martin R. Studer
638 Ferguson Ave., Suite 1
Bozeman, MT 59718

Martin R. Studer
Attorney for Plaintiffs
and Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2002 for Windows, is 2,935 words, not averaging more than 280 words per page, including certificate of service and certificate of compliance.

DATED this 7 day of July, 2010.

Martin R. Studer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing was duly served upon the following by depositing the same, postage prepaid and addressed as indicated, in the mail this 7 day of July, 2010.

Allan Baris
Moore, O'Connell
& Refling, P.C.
P.O. Box 1288
Bozeman, MT 59715

Guy W. Rogers
Brown Law Firm, P.C.
P.O. Drawer 849
Billings, MT 59103-0849

Hon. Wm. Nels Swandal
District Court
P.O. Box 437
Livingston, MT 59047

Jennifer Brandon
Clerk of District Court
615 S. 16th Ave., Rm. 302
Bozeman, MT 59715

Martin R. Studer